89-1356

NO. _____

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

Spring term, 1990

CONCEPCION GIOVE,

Respondent,

vs.

RUDY STANKO,

Petitioner,

PETITION FOR WRIT OF CERTIORARI

THE UNITED STATES COURT OF APPEALS EIGHTH CIRCUIT

Rudy G. Stanko
P. O. Box 8000
Bradford, PA 16701

December 28, 1989

QUESTIONS PRESENTED FOR REVIEW

1). Did the Magistrate's orders usurp Article III judicial authority and the mandatory requirements of 28 U. S. C. 636 when the Magistrate proceeded without a signed written consent of the Petitioner.

2). Was Petitioner denied the mandatory requirements of 28 U. S. C. 1654 which guarantees the right right to be informed, to appear, and to be present?

3). Did the United States District Court error when it failed:

i). to impose upon the Plaintiff/Respondent the mandatory requirements of the Revised Nebraska Statute, 25 § 1030.1 (to bring the action in the name of the original defendant to the cause, a sine quo non to the action itself);

ii) to require proper and timely service upon the original defendants to the action, as mandated by the statute;

iii). to require the Plaintiff/Respondent to submit proof of proper service thereon.

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OPINIONS AND JUDGEMENTS BELOW

On August 25, 1986, Certification of Judgement for Registration in another District, with a copy of Judgement attached was filed with the United States District Court of the District of Nebraska.

On November 18, 1986, Respondent filed "motion for the issuance of a writ of garnishment".

On February 3, 1987, an order was issued granting motions to intervene by Jean A. Stanko, and the Respondent's motion that funds represented by certificates of deposit shall be paid by garnishee, Scottsbluff National Bank, into registry of this court.

On July 1, 1987, a Consent to Proceed before a United States Magistrate (Filing 37) was filed in the United States District Court for the District of Nebraska. This consent was signed by Jean A. Stanko, individually, and Jean A. Stanko, as next friend of her children, and Concepcion Giove, Respondent.

On July 20, 1988, at a bench trial concerning the above parties, the United States Magistrate made a judicial decree without consent of Petitioner Rudy G. Stanko and in violation of 28 U.S.C. 636(a)(1).

On January 5, 1989, U. S. District Judge Urbom overruled the Petitioner's application in objection to the Magistrate's order pursuant to 636 and found Revised Statute of Nebraska (R. S. N.) § 25-1030.10 did not have merit.

The U. S. Magistrate stated in his memorandum and court order:

> "Thus it is the intent of the contributor, defendant Rudy Stanko, which is critical, the intent of others is quite beside the point. The intervenor has failed to meet her burden in this respect."

On August 17, 1989, the Eighth Circuit Court of Appeals affirmed the lower Court's Order.

On August 28, 1989, Petitioner Rudy G. Stanko filed a Motion to Recall the Mandate with a Request for Rehearing En Banc.

On October 5, 1989, the Eighth Circuit Court of Appeals denied Petitioner's Petition for a Rehearing with Request for Rehearing En Banc.

On November 13, 1989, Petitioner filed an Amended Petition for Rehearing with Request for Rehearing En Banc.

On November 15, 1989, the Eight Circuit Court of Appeals denied the Petitioner's Amended Petition for Rehearing with Request for Rehearing En Banc.

JURISDICTION

There has been an absence of notice to the Petitioner that a magistrate has been designated by an Article III District Court Judge, as required by 28 U.S.C. 636(c). The Magistrates Act, 28 U.S.C. 636, et seq., requires specific designation to serve by an Article III District Court Judge, a sine qua non to the magistrate's jurisdiction. On July 1, 1987, a Consent to Proceed before a United States Magistrate (Filing 37) was filed in the United States District Court for the District of Nebraska This consent was signed by Jean A. Stanko, individually, and Jean A. Stanko, as next friend of her children, and Concepcion Giove. The consent form specifically states, "NOTE: return this form to the Clerk of Court only if it has been executed by all parties to this case".

There is a total absence of authority in the Constitution of the United States; the United States Code; and the Rules of Civil Procedure, for a United States Magistrate to serve upon a civil case absent written consent of all parties, and issue orders pertaining thereto. 28 U.S.C. 636.

An Appeal was filed to the United States Court of Appeals for the Eighth Circuit on March 15, 1989. The

Appeal was denied on August 17, 1989. A Petition for Rehearing was filed on August 28, 1989 it was denied on October 5, 1989.

The jurisdiction of this Court is invoked pursuant to First Amendment to the United States Constitution, Article Three of the United States Constitution and/or 28 U. S. C. § 1254.

CONSTITUTIONAL PROVISIONS & FEDERAL AND STATE STATUTES

United States Constitution,
Article III . . . 10, 11, 15, 18, 20, 21, 22, 33, 45

Fifth Amendment 17, 20

Ninth Amendment 20, 21

Tenth Amendment 20, 21

Fourteenth Amendment 17

28 U. S. C. 636 . . . . 1, 8, 10, 11,15, 16, 18, 19, 20, 23, 24, 25, 40, 44, 45

28 U. S. C. 1252 2

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Article 1, Section 1 17

– Article I, Section 3 17

Nebraska Revised Statutes,
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R. S. N. §25-1030.03 . . . . . 13, 33, 34

STATEMENT OF THE CASE

A default judgement was entered in the State of Colorado against Defendants Cattle King Packing Co., Inc., a Colorado corporation, and Rudy Stanko, a stockholder of the Cattle King Packing Co., Inc. and a resident of the State of Nebraska, in favor of the Respondent Concepcion Salmon Giove, who was an ex-employee in the janitorial department of the Cattle King Packing Company of Denver, Colorado.

On August 25, 1986, Certification of Judgement for Registration in another District, with a copy of Judgement attached was filed with the United States District Court of the District of Nebraska.

On November 18, 1986, Respondent filed "motion for the issuance of a writ of garnishment".

The Petitioner has three children: Christine Stanko born in 1973; Cara Stanko born in 1975; and Scott Scott born in 1978. At the time of their births, checking

accounts were opened in their names with money given as gifts by family, friends, and parents. All children obtained their social security numbers, and paid income tax on the interest earned from the individual accounts. Christine Stanko's account was approximately $22,781.70, Cara Stanko's account was approximately $18,442.33, and Scott Stanko's account was approximately $17,357.50.

On February 3, 1987, an order was issued granting the motion to intervene by Jean A. Stanko.

On February 3, 1987, the United States District Court for the District of Nebraska ordered all of these funds into the registry of the Court as a result of a garnishment proceedings naming their father, the Petitioner, as the Defendant. The Petitioner's name, their mother, Jean Stanko, and each individual child co-existed on each of the children's deposit accounts. On July 21, 1989, the United States Magistrate for the District of Nebraska ordered the children's money to be paid to the Respondent.

The United States District Court included the Petitioner as a defendant, at a later date the United States District Court arbitrarily excluded the Petitioner for notification of court hearings and court rulings. The Respondent, the Intervenor, and the Court failed to notify Petitioner Rudy G. Stanko of any pleadings and orders of this case.

On March 3, 1987, Rudy G. Stanko was moved to the Federal Correctional Institution in El Reno, Oklahoma. (See Prisoner Housing Quarters).

On March 25, 1987, Petitioner Rudy G. Stanko was moved to the Federal Correctional Institution in Milan, Michigan. (See Prisoner Housing Quarters).

On April 9, 1987, writs of garnishment was issued by the Court and a copy was mailed to judgement-debtor Rudy G. "Butch" Stanko # 18259-013, P. O. Box 1000-LVC Leavenworth, KS 66048.

Petitioner Rudy G. Stanko arrived at the Federal Medical Center in Rochester, Minnesota, on April 21, 1987. (See Prisoner Housing Quarters).

On May 6, 1987, writ of garnishment was issued and a copy was mailed to judgement-debtor Rudy G. "Butch" Stanko # 18259-013, P. O. Box 1000-LVC Leavenworth, KS 66048.

On July 1, 1987 the Respondent and the Intervenor signed a form entitled Consent to Proceed before a United States Magistrate. Thereafter, the orders in this case were decided by a United States Magistrate. This was a violation of Article III of the United States Constitution and the Magistrate Act, which requires the signature of all parties to an action before a Magistrate can proceed. This consent was signed by Jean A. Stanko, individually, and Jean A. Stanko, as next friend of her children, and Concepcion Giove, plaintiff. The consent form specifically states, "NOTE: return this form to the Clerk of Court only if it has been executed by all parties to this case". Defendant Rudy G. Stanko did not sign the consent form, nor did he know of its existence until a personal para-legal copied several documents from the Court's file for him.

On July 8, 1987, writs of garnishment was issued and a copy was mailed to judgment-debtor Rudy G. "Butch" Stanko, # 18259-013, P. O. Box 1000-LVC Leavenworth, KS 66048.

On July 20, 1988, at a bench trial concerning the above parties, the United States Magistrate without consent of Defendant Rudy G. Stanko and pursuant to 28 U.S.C. 636(a)(1), stated in his memorandum and Court Order:

IT THEREFORE IS HEREBY ORDERED:

> "The funds paid into the registry of the court -- representing the three certificates of deposit which have been garnished in this action -- and the interest earned thereon, shall be paid to the Plaintiff." (see page 23).

However, on page 18 of this order, Magistrate Piester stated the intent of defendant Rudy G. Stanko was critical:

> "Thus it is the intent of the contributor, defendant Rudy Stanko, which is critical, the intent of others is quite beside the point. The intervenor has failed to meet her burden in this respect."

On January 5, 1989, the Court overruled the application in objection to the Magistrate's order and found the Revised Statutes of Nebraska (R. S. N.) § 25-1030.01 did not have merit.

REASONS FOR GRANTING CERTIORARI

Petitioner Rudy G. Stanko did not sign the consent form authorizing a Magistrate to proceed in this case.

On July 1, 1987, a Consent to Proceed before a United States Magistrate (Filing 37) was filed in the United States District Court for the District of Nebraska This consent form was signed by Jean A. Stanko, individually, Jean A. Stanko, as next friend of her children, and Concepcion Giove The consent form specifically states: "NOTE: return this form to the Clerk of Court only if it has been executed by all parties to this case". Petitioner Rudy G. Stanko did not sign the consent form, nor did he know of its existence.

There is a total absence of authority in the Constitution of the United States; the United States Code; and the Rules of Civil Procedure, for a United States Magistrate to serve upon a civil case absent written consent of all parties, and issue orders pertaining thereto. See Article III, 28 U. S. C. 636 and Rule 73.

It is undisputed that United States Magistrates do not possess the protections constitutionally afforded to Article III judges.

Petitioner Rudy G. Stanko has not requested the assignment of this civil matter to a magistrate, nor has he ever consented to such an assignment to a magistrate.

There was been an absence of notice to the Petitioner that a magistrate had been designated by an Article III District Court Judge, as required by 28 U. S. C. 636(c). The Magistrates Act, 28 U. S. C. 636, et seq., requires specific designation to serve by an Article III District Court Judge, a sine qua non to the magistrate's jurisdiction.

Petitioner Rudy G. Stanko did not receive pleadings in the action conducted in the United States District Court for the District of Nebraska.

Revised Statutes of Nebraska (R. S. N.) § 25-1030.01 mandates that the plaintiff shall give the "garnishee and the defendant in the original action notice of filing thereof and of the time and place of trial thereon". .

In the original action, the Respondent did not give the Petitioner Rudy G. Stanko notice of garnishment proceedings and the time and place of trial.

Rudy G. Stanko did not receive any mailings from the Respondent or the Court from February 5, 1987 until June 5, 1987, Rudy G. Stanko was receiving the "diesel therapy" (he was transferred to 6 prisons in a 40 month period) for his legal pleadings against the Bureau of Prisons, Petitioner was not given the opportunity to object. The Petitioner was moved frequently and disrupted. He was placed in "the hole", receiving diesel therapy, and his legal files were confiscated by the federal Bureau of Prison. The Respondent and the Court failed to obtain a response and/or consent for a U. S. Magistrate to conduct the trial in which the Petitioner was named as the Defendant.

Rudy G. Stanko did not receive any of the documents and pleadings filed in the United States District Court for the District of Nebraska, nor was Rudy G. Stanko aware or in any position to contact the court, in order to

object to any of the Respondent's pleadings, to intervene, or to defend the above entitled action.

R. S. N. § 25-1030.03 applies to the Intervenor and was improperly applied to Petitioner Rudy G. Stanko in it's interpretation by the United States District Court in violation of the Constitution, the Laws, and the Statutes of the United States and the State of Nebraska.

It has not been proven Petitioner Rudy G. Stanko has any ownership interest, nor did he claim any ownership interest in the various Certificates of Deposit involved in this action.

Petitioner Rudy G. Stanko could not intervene in the action as he did not have ownership of the Certificate of Deposits, nor was he notified in a timely manner of these legal proceedings. The ownership of these Certificate of Deposits belong solely to the minor children.

The officer to whom a writ of execution is delivered shall give notice in writing to the court, which shall set forth the names of the plaintiff and defendant, together with the names of the claimant. In this case, the officer

listed Rudy G. Stanko as a defendant, and not a claimant. The Clerk of the District Court and the Respondent verified that Rudy G. Stanko was a defendant and not a claimant when it filed case numbered CV-86-L-582.

The Court did not establish the interest of Rudy G. Stanko in the Certificates of Deposit, nor did the Court render a judgment for Rudy G. Stanko as a claimant.

The only parties to this original action presently pending before the Court are Rudy G. Stanko and Cattle King, neither Jean Stanko, nor Scottsbluff National Bank were designated on the record as defendants, nor were either a party taking part of the original action.

Concepcion Giove has no legal recourse to proceed against Jean A. Stanko or Scottsbluff National Bank. It is only through Petitioner Rudy G. Stanko that Concepcion Giove is able to proceed, clearly Petitioner Rudy G. Stanko is an "indispensable party" to this action.

Rudy G. Stanko and Cattle King Packing Company are defendants in the original action, and are necessary "indispensable parties" to this action.

The absence of service upon Rudy G. Stanko deprived Rudy G. Stanko of the "voluntariness of parties' consent to the reference of civil matters to a magistrate" (28 U. S. C. 636 (c)(2)). Rudy G. Stanko would have objected to the appointment of a magistrate, and would not have signed the consent form.

The absence of service of the consent form upon the Petitioner, as statutory required by 28 U. S. C. 636 (c)(2), deprived Rudy Stanko, of his Constitutional and Statutory Rights to a determination of all matters in this civil proceeding by an Article III United States Court Judge.

The prejudice to Petitioner Rudy G. Stanko is as follows:

(1). Petitioner Rudy G. Stanko was deprived of the statutory right to bring in, name, and serve, a third party defendant

(2). The Petitioner Rudy G. Stanko was deprived of the right to "set up facts showing that the debt or the property with which it is sought to charge the garnishee

is (1) exempt from execution, or (2) for any other reason is not liable for Plaintiff's claim."

(3). The Petitioner Rudy G. Stanko was deprived of his statutory and constitutional right to object to the reference of this civil matter to a United States Magistrate. 28 U. S. C. 636 (c)(2).

The sole basis for execution of judgements relies upon an action against the original defendants Rudy G. Stanko and Cattle King Packing Company. The Respondent asserts the right to garnishee based entirely upon their claim of judgement against the original defendants, and the original defendants interest in certain property sought to be garnished.

In addition to the statutory rights, referred to herein, Petitioner Rudy G. Stanko, asserts his substantive constitutional rights under the Constitution of the State of Nebraska under Article I, Section 1, the right to "the protection of property as an equal right"; Article I, Section 3, the right of "due process of law, no person shall be deprived of life, liberty, or property ,without the due

process of law"; and his inalienable rights under the Constitution of the United States, under the Fifth Amendment made applicable through the Fourteenth Amendment, Due Process of Law, and his right to appear and defend against the seizure of property under the Constitution and Laws of the United States and the State of Nebraska (Title 28 U. S. C. 1654 made applicable to the state through Article 6 of the United States Constitution).

ISSUE NO. ONE

DEFENDANT RUDY G. STANKO DID NOT SIGN THE CONSENT FORM AUTHORIZING A MAGISTRATE TO PROCEED IN THIS CASE

On July 1, 1987, a Consent to Proceed before a United States Magistrate was filed in the United States District Court for the District of Nebraska. This consent form was signed by Jean A. Stanko, individually, Jean A. Stanko, as next friend of her children, and Concepcion Giove, plaintiff. The consent form specifically states: "NOTE: return this form to the Clerk of Court only if it has been executed by all parties to this case". Petitioner Rudy G. Stanko did not sign the consent form.

The United States Magistrate in absence of authority issued direct orders of the Court. This undelegated judicial authority is in violation of Article III of the United States Constitution, the United States Magistrate's Act (28 U. S. C. 636), orders of the Supreme Court adopting and amending rules applicable to civil procedure, certain Acts of Congress, and contrary to Supreme Court and Circuit Court opinions.

In 28 U. S. C. 636 (a) the inherent powers and duties of United States Magistrates are specifically enumerated. These are:

> (1) all powers and duties conferred or imposed upon United States Commissioners by law or by the Rules of Criminal Procedure for the United States Courts;
>
> (2) the power to administer oaths and affirmations impose conditions of release under section 3146 of title 18, and take acknowledgements, affidavits and depositions; and
>
> (3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section.

In 28 U. S. C. 636(b)(1) the United States District Court Judge may designate a Magistrate to perform certain functions except those specifically excluded in (A). In (B) the judge may designate a magistrate to conduct hearings and submit findings of fact and recommendations for the disposition, by a judge of the court, of applications for post-trial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

Magistrates cannot issue direct orders of the Court dismissing or denying such petitions. They can only make recommendations to an Article III District Court Judge for final determination. Orders issued by a magistrate to the contrary is a deliberate usurpation of judicial authority restricted solely to Article III judges. Wimmer v. Cook, 774 F. 2d 68 (4th Cir. 1985).

This violates the mandatory requirements incorporated in the Constitution of the United States under Article III, and Amendment IX, Amendment X, and the due process of law protected by the Fifth Amendment to the Constitution. There is a total absence of authority in the Constitution of the United States; the United States Code; and the Rules of Civil Procedure, for a United States Magistrate to serve upon a civil case absent written consent of all parties, and issue orders pertaining thereto. (See 28 U. S. C. 636 and Rule 72).

Article III provides that the judicial power of the United States "shall extend to all Cases, in Law and Equity". In Clause 1 it provides:

> "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall at stated Times, receive for their Services, a Compensation which shall not be diminished during their Continuance in Office".

It is undisputed that United States Magistrates do not possess the protections constitutionally afforded to Article III judges. Therefore, they cannot exercise Article III judicial authority.

The Ninth Amendment states: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people".

The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people".

These are the Petitioner's basic inherent substantive rights protected by the Constitution of the United States.

The Supreme Court previously construed Northern Pipeline Construction Co. v. Marathon Pipeline Co., 458 U. S. 50, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (1982) that Section 636(c) of the Magistrates Act did not confer Article III judicial authority to United States Magistrates.

Unlike the "consent of the parties taken from their failure to object to either order of reference or to any proceedings before magistrate until after his report was filed with district court", Hill v. Duriron, 656 F. 2d 1208 (6th Cir. 1981), this is a case where the consent form was filed containing the Plaintiff's signature and the Intervenor's signature, absent the Defendant's signature. The consent form was filed with the Court, despite the notice stating "Return this form to the Clerk of Court only if it has been executed by all parties to the case". This consent form authorizing this case to proceed before Magistrate David L. Piester was not sent to the Defendant either before or after its filing, therefore usurping Article III Judicial authority, absent specific consent of the parties, as required under 28 U. S. C. 636(c), Lehman

Bros. Kuhn v. Clark Oil & Refining, 739 F. 2d 1313 (8th Cir. 1984).

As pointed out by the Seventh Circuit in Hill v. Jenkins, 603 F. 2d 1256 (7th Cir. 1979) consent of the parties is required by the Magistrates Act on civil cases demanding a jury trial.

"The only duty that can be performed by the magistrate (under Section 636(b)) is to make certain studies and hand them to the judge for his final order in the matter." (House Hearings 83-84, 127); and under 28 U. S. C. 636(c) the written consent of the parties is required, as the mandatory requirements of the statute provide, as stated in relevant part:

> "Upon consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or non-jury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves." (28 U. S. C. 636(c)(1)).

> "If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection the clerk of court shall, at the time the action is filed notify the parties of their right to consent to the exercise of such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent." (28 U. S. C. 636(c)(3).)

Petitioner Rudy G. Stanko did not request the assignment of this civil matter to a magistrate, nor did he ever consent to such an assignment to a magistrate.

There has been an absence of notice to the defendant that a magistrate has been designated by an Article III District Court Judge, as required by 28 U. S. C. 636(c). The Magistrates Act, 28 U. S. C. 636, et seq., requires specific designation to serve by an Article III District Court Judge, a sine qua non to the magistrate's jurisdiction.

The usurpation of undelegated judicial authority was treated by the Supreme Court in Wingo v. Wedding,

418 U. S. 61, 41 L. Ed. 2d 879, 94 S. Ct. 2842 (1974), where the Court held that Congress had not authorized magistrates to hold evidentiary hearings, and the constitutional infirmity was not cured by the Court's Local Rule.

If Magistrates are to have judicial authority, it must come from Congress, should they choose to do so. Until such time as Congress amends 28 U. S. C. 636 to grant judicial authority to magistrates, as they amended it to grant authority to hold evidentiary hearings, the Magistrate is precluded by the Constitution and 28 U. S. C. 636 from exercising that authority and Congress is precluded by Article III of the United States Constitution to confer judicial authority to government employees who are not protected by life tenure.

ISSUE NO. TWO

PETITIONER RUDY G. STANKO WAS DENIED HIS BASIC INHERENT CONSTITUTIONAL RIGHT OF DUE PROCESS AND HIS STATUTORY RIGHT (28 U. S. C. 1654) TO PERSONALLY APPEAR AND PRESENT HIS CAUSE

Respondent has previously stated: "Plaintiff's motion for the issuance of a writ of garnishment was mailed to Defendant Rudolph Stanko on or about July 24, 1986, at his Scottsbluff, Nebraska address, his last known address according to Court records." This is belied by the attached docket sheet in the above style and numbered cause. This exhibit clearly proves the motion referred to by the Respondent could not have been sent to Petitioner a full month before the Certification of Judgement for Registration was filed and registered in the State of Nebraska on August 25, 1986. It defies reason and logic that the Respondent would send the motion for the issuance of a writ of garnishment a full month before certifying the Judgment.

In fact the "Plaintiff's motion for the issuance of a writ of garnishment" was not filed until November 14,

1986, and therefore could not have been served on Rudy G. Stanko over four months earlier. Federal Rules of Civil Procedure, Rule 64, mandates "all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgement . . are available . . . in the manner provided by the law of the state. . . .

Rule 64 of Rules of Civil Procedure states:

> At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, . .

R. S. N. § 25-1030.01 provides the manner of service in garnishment cases:

> R. S. N. § 25-1030.01. Garnishee; application; notice; manner of service. Upon filing an application for determination of liability of the garnishee, the plaintiff shall give the garnishee and the defendant in the original action notice of the filing thereof and of the time and place of trial thereon. The notice shall be given within such time and in such manner as the court shall direct.

This statute mandates that the plaintiff shall give the "garnishee and the defendant in the original action notice of filing thereof and of the time and place of trial thereon". .

In the original action, the Respondent did not give the Defendants (Rudy G. Stanko and Cattle King Packing Company) notice of garnishment proceedings and the time and place of trial.

Judge Urbom assumed that Rudy G. Stanko received the following:

> "Order (WKU) granting motion to intervene by Jean A. Stanko (#9); funds represented by certificates of deposit shall be paid by garnishee, Scottsbluff National Bank, into registry of this court; and giving party, including Intervenor, until 2-18-87 to make further showing re motion to distribute funds to pl Copy mailed to counsel, garnishee and Rudy G. "Butch" Stanko. (Mailed February 3, 1987).

On February 5, 1987, Rudy G. Stanko was no longer in the Federal Prison Camp, but instead was housed in the "the hole" or the Detention Unit at the Leavenworth Penitentiary. The above mailing was not forwarded to

Rudy G. Stanko in "the hole" (Detention Unit) at the Leavenworth Penitentiary. Rudy G. Stanko was transferred to "the hole" or Detention on February 5, 1987, and remained in "the hole" at the penitentiary until March 3, 1987, at which time he was transferred from the Leavenworth Penitentiary to the Federal Correctional Institution in El Reno, Oklahoma. At no time did Rudy G. Stanko receive these mailings.

> "Issue Writs of garnishment - Orig & 2 - to pl's counsel - copy mailed to judgment - debtor Rudy G. "Butch Stanko, #18259-013, P. O. Box 1000-LVC, Leavenworth, KS 66048 and 2102 W. 20th, Scottsbluff, NE 69361. (Mailed April 9, 1987).

On April 9, 1987, Rudy G. Stanko was not at the Federal Prison Camp in Leavenworth, Kansas, but was at the Leavenworth Penitentiary. On March 25, 1989, Rudy G. Stanko arrived at the Federal Correctional Institution in Milan, Michigan.

Rudy G. Stanko did not receive this mailing.

> "Writ of garnishment issue - Orig & 2 - to pl's attorney' copy mailed to judgement-debtor Rudy G. "Butch" Stanko # 18259-013, P. O. Box 1000-LVC

> Leavenworth, KS 66048 and 2101 West 20th, Scottsbluff, NE 69361. (Mailed May 6, 1987).

On May 6, 1987, Rudy G. Stanko was not at the Federal Prison Camp in Leavenworth, Kansas, but was in the Administrative Detention Unit at the Federal Medical Center, in Rochester, Minnesota. Rudy G. Stanko arrived at the Rochester, Minnesota, Federal Medical Center on April 21, 1987. Rudy G. Stanko was subsequently transferred from Milan, Michigan, to Rochester, Minnesota.

Rudy G. Stanko did not receive this mailing.

> "Writs of garnishment issued - Orig & 2 - to pl's attorney' copy mailed to judgment-debtor Rudy G. "Butch" Stanko, # 18259-013, P. O. Box 1000-LVC Leavenworth, KS 66048 and 2101 West 20th Scottsbluff, NE 69361. (Mailed July 8, 1987).

On July 8, 1987, Rudy G. Stanko was not at the Federal Prison Camp in Leavenworth, Kansas, but was at the Federal Medical Prison in Rochester, Minnesota.

Rudy G. Stanko did not receive any of the above mailings. From February 5, 1987 until June 5, 1987, Rudy G. Stanko was receiving the "diesel therapy" for his legal

pleadings against the Bureau of Prisons, and the Petitioner did not have the opportunity to object. The Petitioner was moved frequently and disrupted. He was placed in "the hole" or detention, or in diesel therapy, and his legal files were confiscated, while the Respondent and the Court failed to obtain a response from the Petitioner.

Judge Urbom's assumption is incorrect and inaccurate. Rudy G. Stanko did not receive any of the documents described by Judge Urbom, nor was Rudy G. Stanko in any position to contact the court, in order to object to any of the pleadings, to intervene, or to appear and/or defend the above entitled action. The Court sue sponte should have issued a writ of habeas corpus, giving the Petitioner his basic inherent constitutional due process right and statutory right (28 U. S. C. 1654) to personally appear and present his case).

ISSUE NO. THREE

R.S.N. § 25-1030.03 APPLIES TO THE INTERVENOR AND WAS IMPROPERLY APPLIED TO RUDY G. STANKO IN VIOLATION OF THE CONSTITUTION AND THE LAWS AND STATUTES OF THE UNITED STATES AND THE STATE OF NEBRASKA

The United States District Court failed:

1) to impose the mandatory requirements of the Revised Nebraska Statute 25 § 1030.10 upon the Petitioner in order to bring this action in the name of the original defendant to this cause, a sine qua non to the action itself; 2) to require proper and timely service upon the original defendants to the action, as mandated by the statute; 3) and to require the Respondent to submit proof of proper service thereon.

At the commencement of this action, the Petitioner was named as the Defendant. After case numbered CV-86-L-582 was filed and docketed, Petitioner Rudy G. Stanko and Defendant Cattle King was ignored by the Court and the Plaintiff/Respondent. On the final ruling, United States Judge Urbom contradicted the Magistrate, but still

upheld the illegality of the Magistrate's bench trial by changing the Petitioner's role from a defendant to an intervenor. At the bench trial on July 20, 1988, the United States Magistrate confirmed on page 18 of his order:

> "Thus it is the intent of the contributor, defendant Rudy Stanko, which is critiçal, the intent of others is quite beside the point. The intervenor (referring to Jean) has failed to meet her burden in this respect.

When the Petitioner objected to the Magistrate's usurpation of Article III authority, the United States District Judge Urbom stated:

> "Thereafter the original defendant, Rudy Stanko, had ample opportunity under § 25-1030.03 to intervene if he wished to claim ownership of any money or property sought to be reached by the garnishment. . . . The documents that were mailed by the clerk of this court were, I find, received by Rudy G. Stanko and they gave him adequate notice of the proceedings to enable him to intervene, if he so chose, in accordance with § 25-1030.03 of Nebraska Revised Statutes.

R. S. N. 25-1030.03 reads:

> Any person claiming ownership of any money or property sought to be reached in

> the possession of or under the control of the garnishee as the property of of the defendant in the original action may intervene in the garnishment proceedings by a suitable pleading and set up facts showing that the debt or property with which it is sought to charge the garnishee is the property of such Intervenor. . .

It has not been proven Rudy G. Stanko has any ownership interest, nor does he claim any ownership interest in the various Certificates of Deposit involved in this action.

This statute applies solely to those individuals who: 1) claim ownership in the money or property, and 2) as the result of that claim of ownership may intervene in the garnishment proceedings. This statute excludes Rudy G. Stanko from intervening in this action.

RUDY G. STANKO IS AN ORIGINAL PARTY AND A NECESSARY PARTY

Judge Urbom's assessment that Rudy G. Stanko "was not a party and is not a party to this garnishment proceedings, nor is he a necessary party" is inaccurate.

R. S. N. § 25-1030.01 requires: "the plaintiff shall give the garnishee and the defendant in the original action notice of the filing thereof and of the time and place of trial thereof."

The Respondent failed to serve the Defendants in the original actions, as required by R. S. N. 25 § 1030.01 a notice.

> R. S. N. § 25-1030.01. Garnishee; application; notice; manner of service. Upon filing an application for determination of liability of the garnishee, the plaintiff shall give the garnishee and the defendant in the original action notice of the filing thereof and of the time and place of trial thereon. The notice shall be given within such time and in such manner as the court shall direct.

Rule 64 of Rules of Civil Procedure states:

> At the commencement of and during the course of an action, all remedies providing for seizure of person or property

> for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, . .

The only "parties" in the original action are Rudy G. Stanko and Cattle King, Fed. Rules of Civ. Pro., Rule 17 provides:

> (a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. . . . .

This Rule provides that the real party in interest must be present. A real party in interest has been held to mean:

> A person concerned or having or taking part in any affair, matter, transaction, or proceedings, considered individually. A "party" to an action is an person whose name is designated on records as plaintiff or defendant. M & A Elec. Power Co-op vs. True, Mo. App. 480 S. W. 2d. 310, 314.

The only parties to this original action presently pending before the Court are Rudy G. Stanko and Cattle King, neither Jean Stanko, nor Scottsbluff National Bank were designated on the record as defendants, nor were either a party taking part of the original action. Golattee

vs. Mathews, D. C. Ala. 394 F. Supp. 1203, 1207, points out that a "party" refers only to those by or against whom a legal suit is brought, all others are persons interested, but are not parties.

> "Party" is a technical word having a precise meaning in legal parlance; it refers to those by or against whom a legal suit is brought, whether in law or in equity, the party plaintiff or defendant, whether natural or legal persons; all others who may be affected by the suit, indirectly or consequently, are person interested but not parties. Golattee vs. Mathews, D. C. Ala. 394 F. Supp. 1203, 1207.

Fed. Rules of Civil Pro. Rule 17 (b) provides:

> (b) Capacity to Sue or be Sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile.

"Capacity" refers to legal competence to be party to a lawsuit. Plaintiff must have the capacity to sue, and defendant must have capacity to be sued. Jean A. Stanko and Scottsbluff National Bank do not have the capacity to be sued by Concepcion Giove. Only through Defendant

Rudy G. Stanko does either of these parties have the capacity to be brought into this action.

Concepcion Giove has no legal recourse to proceed against Jean A. Stanko or Scottsbluff National Bank. It is only through Defendant Rudy G. Stanko that Concepcion Giove is able to proceed, clearly Defendant Rudy G. Stanko is an "indispensable party" to this action:

> Determining which parties are to be joined as plaintiff or defendants requires consideration of the rules of compulsory and permissive joinder. Compulsory joinder rules cover parties who must be joined, thence "indispensable parties". These persons are those whose interests are so unavoidably involved that the court could not proceed without them. Failure to join such parties meant that the action had to be dismissed. Shields vs. Barrow, 58 U. S. 130 (1855).

R. S. N. 25-1030.01, provides:

> "Upon filing an application for determination of liability of the garnishee, the plaintiff shall give the garnishee and the defendant in the original action notice of the filing thereof and of the time and place of trial thereon. The notice shall be given within such time and in such manner as the court shall direct."

Defendant Rudy G. Stanko and Cattle King Packing Company are defendants in the original action; are necessary "indispensable parties" to this action; and the mandatory required statute law is applicable to this action pursuant to Rule 64, Fed. R. Civ. P. by requiring the notification to the defendant of the filing, time, and place of trial thereon.

Federal Rules of Civil Procedure, Rule 19, provides the following qualifications:

> Fed. R. Civ. P. 19 (a) provides that any person with an interest in the subject of a pending action shall be joined as a party if:
>
> (1) In his absence, complete relief cannot be accorded those already parties; or
>
> (2) His interest is such that to proceed without him would be substantially prejudicial because it would:
>
> i. Impair his ability to protect his interest in later proceedings; or
>
> ii. Expose the parties already before the court to the risk of double liability or inconsistent obligations.

It is frivolous for Respondent to propose the arbitrary seizure right to this Court against the original

defendants, and their interest in property, held by others, but at the same time state it is unnecessary to serve the original defendants in violation of the mandatory requirements of Acts of Congress of the State of Nebraska and the United States. (R. S. N. § 25-1030,01; 28 U. S. C. 636 (c)(2)).]

IN REM PROCEEDINGS

The Respondent has previously stated: 'Garnishment is an in rem proceeding, and therefore, it is a proceeding or action against the Certificate of Deposits', and as such takes no cognizance of owner but determines right in specific property against all of the world, equally binding on everyone, Flesch vs. Circle City Excavating & Rental Corp., 137 Ind. App. 695, 210 N. E. 2d 865, 868; in rem proceedings are applied to actions between parties:

> it is true that, in a strict sense, a proceeding in rem is one taken directly against property, and has for its object the disposition of property, without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. Pennoyer vs. Neff, 95 U. S. 714, 24 L. Ed. 565.

In Rem Proceedings, the Supreme Court has held that a person must be given notice and an opportunity to be heard before being deprived of property. Sniadach vs.

Family Finance Corp. 396 U. S. 337 (1969). The Supreme Court has held that when attachment is sought as a provisional remedy (i. e., to secure ultimate payment of an in personam claim and not simply as a basis of jurisdiction), there must be a hearing or at least a showing of definite necessity to seize the property.

The concept of deprivation of property was further refined in Fuentes vs. Shervin, 407 U. S. 67 (1972), the Court emphasized that the opportunity for a prior hearing was a constitutional requirement that did not depend upon the particular type of summary remedy sought, the nature of the property involved, or the duration or severity of the deprivation.

Jean Stanko is merely an Intervenor, which is a person who voluntarily interposes in an action or other proceedings with the leave of the court. It must be stressed that intervention is a procedure whereby a non-party, upon timely application, may become a party in a lawsuit in order to protect her interest in the actions. This procedure by which a third person, not originally a

party to the suit, but claiming an interest in the subject matter, comes into the case in order to protect her right or interpose her claim, and is allowed only with leave of the court.

THE AFFECT OF FAILING TO GIVE NOTICE VOLUNTARINESS OF PARTIES

The absence of service upon the named Petitioner Rudy G. Stanko deprived Rudy G. Stanko of the "voluntariness of parties' consent to the reference of civil matters to a magistrate" (28 U. S. C. 636 (c)(2)), to which Rudy G. Stanko would not have signed the consent form.

The absence of service of the consent form upon the Defendant, as statutory required by 28 U. S. C. 636 (c)(2), deprived Rudy Stanko, of his Constitutional and Statutory Rights to a determination of all matters in this civil proceeding by an Article III United States Court Judge.

CONCLUSION

Petitioner Rudy G. Stanko hereby draws the Court's attention to Article III of the United States Constitution, 28 U. S. C. 636 (c)(2), Rule 72, and R. S. N. § 25- 1030.01 , and request this Court take judicial notice of the mandatory requirements of the United States Constitution and Acts of Congress, which remove discretion from the Court. In words which are clear and requirements which are mandatory, Congress has stated that if violations of the above statutes occur upon the record the orders of the Court entered are without constitutional and statutory authority and must be vacated.

Wherefore, Petitioner Rudy G. Stanko respectfully urges this Court to reverse and remand this case back to the United States District Court for the District of Nebraska.

DATED this 28 day of December ,1989.

Respectfully submitted,

Rudy G. Stanko

Rudy G. Stanko
P. O. Box 8000
Bradford, PA 16701

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that on this 28 day of December, 1989, a true and correct copy of the foregoing motion was deposited in the United States Mail, postage prepaid and addressed to the following:

John S. Evangelisti,
No. 3165
1756 Gilpin Street
Denver, CO 80218

Howard Olsen
1502 Second Avenue
P. O. Box 99
Scottsbluff, NE 69361

Rudy G. Stanko

APPENDIX

ARTICLE III

Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admirality and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section. 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

THE CONSTITUTION OF THE UNITED STATES

[ARTICLE V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or navel forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same office to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[ARTICLE IX]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

[ARTICLE X]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the person.

[ARTICLE XIV]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law' nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 17. Parties Plaintiff and Defendant; Capacity

(a) Real Party In Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the p rty for whose benefit the action is brought; and w en a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(b) Capacity to Sue or be Sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C. §§ 754 and 959(a).

Rule 19. Joinder of Persons Needed for Just Adjudication

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23.

(As amended Feb. 28, 1966, eff. July 1, 1966.)

PROVISIONAL AND FINAL REMEDIES AND SPECIAL PROCEEDINGS

Rule 64. Seizure of Person or Property

At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.

§ 1252. Direct appeals from decisions invalidating Acts of Congress

Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands and any court of record of Puerto Rico, holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.

A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court.

(As amended Oct. 31, 1951, c. 655, § 47, 65 Stat. 726; July 7, 1958, Pub.L. 85–508, § 12(e), (f), 72 Stat. 348; Mar. 18, 1959, Pub.L. 86–3, § 14(a), 73 Stat. 10.)

§ 1654. Appearance personally or by counsel

In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

(As amended May 24, 1949, c. 139, § 91, 63 Stat. 103.)

Historical and Revision Notes

1948 Act

Based on title 28, U.S.C., 1940 ed., § 394 (Mar. 3, 1911, ch. 231, § 272, 36 Stat. 1164).

Words "as, by the rules of the said courts respectively, are permitted to manage and conduct causes therein," after "counsel," were omitted as surplusage. The revised section and section 2071 of this title effect no change in the procedure of the Tax Court before which certain accountants may be admitted as counsel for litigants under Rule 2 of the Tax Court.

Changes were made in phraseology.

1949 Act

This section restores in section 1654 of title 28, U.S.C., language of the original law.

§ 636. Jurisdiction, powers, and temporary assignment

(a) Each United States magistrate serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment—

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

(2) the power to administer oaths and affirmations, issue orders pursuant to section 3142 of title 18 concerning release or detention of persons pending trial, and take acknowledgements, affidavits, and depositions; and

(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section.

(b)(1) Notwithstanding any provision of law to the contrary—

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

(2) A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrates shall discharge their duties.

(c) Notwithstanding any provision of law to the contrary—

(1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate may exercise such jurisdiction, if such magistrate meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

(2) If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of their right to consent to the exercise of such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent.

(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court. In this circumstance, the consent of the parties allows a magistrate designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

(4) Notwithstanding the provisions of paragraph (3) of this subsection, at the time of reference to a magistrate, the parties may further consent to appeal on the record to a judge of the district court in the same manner as on an appeal from a judgment of the district court to a court of appeals. Wherever possible the local rules of the district court and the rules promulgated by the conference shall endeavor to make such appeal inexpensive. The district court may affirm, reverse, modify, or remand the magistrate's judgment.

(5) Cases in the district courts under paragraph (4) of this subsection may be reviewed by the appropriate United States court of appeals upon petition for leave to appeal by a party stating

specific objections to the judgment. Nothing in this paragraph shall be construed to be a limitation on any party's right to seek review by the Supreme Court of the United States.

(6) The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate under this subsection.

(7) The magistrate shall determine, taking into account the complexity of the particular matter referred to the magistrate, whether the record in the proceeding shall be taken, pursuant to section 753 of this title, by electronic sound recording means, by a court reporter appointed or employed by the court to take a verbatim record by shorthand or by mechanical means, or by an employee of the court designated by the court to take such a verbatim record. Notwithstanding the magistrate's determination, (A) the proceeding shall be taken down by a court reporter if any party so requests, (B) the proceeding shall be recorded by a means other than a court reporter if all parties so agree, and (C) no record of the proceeding shall be made if all parties so agree. Reporters referred to in this paragraph may be transferred for temporary service in any district court of the judicial circuit for reporting proceedings under this subsection, or for other reporting duties in such court.

(d) The practice and procedure for the trial of cases before officers serving under this chapter, and for the taking and hearing of appeals to the district courts, shall conform to rules promulgated by the Supreme Court pursuant to section 3402 of title 18, United States Code.

(e) In a proceeding before a magistrate, any of the following acts or conduct shall constitute a contempt of the district court for the district wherein the magistrate is sitting: (1) disobedience or resistance to any lawful order, process, or writ; (2) misbehavior at a hearing or other proceeding, or so near the place thereof as to obstruct the same; (3) failure to produce, after having been ordered to do so, any pertinent document; (4) refusal to appear after having been subpenaed or, upon appearing, refusal to take the oath or affirmation as a witness, or, having taken the oath or affirmation, refusal to be examined according to law; or (5) any other act or conduct which if committed before a judge of the

district court would constitute contempt of such court. Upon the commission of any such act or conduct, the magistrate shall forthwith certify the facts to a judge of the district court and may serve or cause to be served upon any person whose behavior is brought into question under this section an order requiring such person to appear before a judge of that court upon a day certain to show cause why he should not be adjudged in contempt by reason of the facts so certified. A judge of the district court shall thereupon, in a summary manner, hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a judge of the court, or commit such person upon the conditions applicable in the case of defiance of the process of the district court or misconduct in the presence of a judge of that court.

(f) In an emergency and upon the concurrence of the chief judges of the districts involved, a United States magistrate may be temporarily assigned to perform any of the duties specified in subsection (a) or (b) of this section in a judicial district other than the judicial district for which he has been appointed. No magistrate shall perform any of such duties in a district to which he has been temporarily assigned until an order has been issued by the chief judge of such district specifying (1) the emergency by reason of which he has been transferred, (2) the duration of his assignment, and (3) the duties which he is authorized to perform. A magistrate so assigned shall not be entitled to additional compensation but shall be reimbursed for actual and necessary expenses incurred in the performance of his duties in accordance with section 635.

(g) A United States magistrate may perform the verification function required by section 4107 of title 18, United States Code. A magistrate may be assigned by a judge of any United States district court to perform the verification required by section 4108 and the appointment of counsel authorized by section 4109 of title 18, United States Code, and may perform such functions beyond the territorial limits of the United States. A magistrate assigned such functions shall have no authority to perform any other function within the territory of a foreign country.

REVISED STATUTES OF NEBRASKA

25-1030.01. Garnishee; application, notice; manner of service. Upon filing an application for determination of liability of the garnishee, the plaintiff shall give the garnishee and the defendant in the original action notice of the filing thereof and of the time and place of trial thereon. The notice shall be given within such time and in such manner as the court shall direct.

25-1030.03. Garnishment; ownership of property; intervention; trial. Any person claiming ownership of any money or property sought to be reached in the possession or under the control of the garnishee as the property of the defendant in the original action may intervene in the garnishment proceedings by a suitable pleading and set up facts showing that the debt or the property with which it is sought to charge the garnishee is the property of such intervener. The defendant in the original action may by a suitable pleading filed in the garnishment proceedings set up facts showing that the debt or the property with which it is sought to charge the garnishee is (1) exempt from execution, or (2) for any other reason is not liable for plaintiff's claim. If issue on such intervention or on such pleading by the defendant in the original action is joined by the plaintiff, it shall be tried with the issues as to the garnishee's liability. If such debt or property or any part thereof is found to be the property of the intervener, or is found to be exempt or not liable, the garnishee shall be discharged as to that part which is exempt or not liable.

Section 1. **Equal rights.** All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty and the pursuit of happiness. To secure these rights, and the protection of property, governments are instituted among people, deriving their just powers from the consent of the governed.

Art. I

Sec. 3. **Due process of law.** No person shall be deprived of life, liberty, or property, without due process of law.

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEBRASKA

CONCEPCION GIOVE Plaintiff	)	
vs.	)	Docket No. CV-86-L-582
RUDY STANKO AND CATTLE KING PACKING COMPANY, Defendant.	)	
JEAN A. STANKO, ON BEHALF OF HERSELF AND HER CHILDREN, CHRISTINE SUE STANKO, MICHAEL S. STANKO, AND CARA M. STANKO, Intervenor.	)	

CONSENT TO PROCEED BEFORE A UNITED STATES MAGISTRATE

In accordance with the provisions of 28 U. S. C. § 636 (c), the parties to the above-captioned civil matter hereby waive their right to proceed before a Judge of the United States district court and consent to have a United States Magistrate conduct any and all further proceedings in the case (including the trial) and order the entry of a final judgement.

Jean A. Stanko
Individually

Jean A. Stanko
As Next of Friend of her Children

Concepcion Giove
Concepcion Giove

NOTE: Return this form to the Clerk of Court only if it has been executed by all parties to the case.

ORDER OF REFERENCE

IT IS HEREBY ORDERED that the above-captioned matter be referred to United States Magistrate David L. Piester for the conduct of all further proceedings and the entry of judgement in accordance with 28 U. S . C. § 636 (c) and the foregoing consent of the parties.

June 30, 1987
Date

Warren Urbom
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

Civil Action No. 84-C-1096 (Colorado)
CV 86-L-582 (Nebraska)

CONCEPCION GIOVE,

Plaintiff,

v.

RUDY STANKO, CATTLE KING PACKING COMPANY,

Defendants.

MOTION FOR ISSUANCE OF WRIT OF EXECUTION

The above-named plaintiff, by and through her attorneys, LaFond & Evangelisti, moves the court to order issuance of a writ of execution without delay to enforce the money judgment rendered in this action. In support of the motion, the plaintiff states:

1. On July 8, 1986, judgement was rendered in the United States District Court for the District of Colorado in favor of Concepcion Giove and against Rudy Stanko and Cattle King Beef Company for $824,650.59, together with interest therein at the rate of 7 percent per annum from July 8, 1986, until paid.

2. The judgement was duly certified and registered in the office of the Clerk of the District Court in the United States Court of the District of Nebraska but no part of the judgment or interest has been paid or satisfied, and there now remains due and owing from Rudy Stanko

and Cattle King Beef Company on the judgment the full amount in the sum of $824,650.59 plus interest thereon as provided in the judgment.

3. The judgment is final and subject to enforcement in that no motion for postjudgment relief has been filed, the time therefor having expired, and in that no order has been issued and no motion or supersedeas has been filed to stay enforcement of the judgment.

Wherefore, plaintiff respectfully requests the Honorable Court to GRANT her Motion for Issuance of a Writ of Execution.

Respectfully submitted,

Karen V. Hendrick, # 13905
LaFond & Evangelisti
1756 Gilpin Street
Denver, CO 80218
(308) 38804551

PETERSON, NELSON
JOHANNS, MORRIS &
HOLDERMAN
1560 S. 70th Street
P. O. Box 5526
Lincoln, NE 68505
(402) 488-0985

UNITED STATES COURTS OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2191

Concepcion Giove,	*
	*
Appellee,	*
	*
v.	*
	*
Rudy Stanko; Cattle King Packing Company d/b/a Cattle King, et al,	*
	*
Jean A. Stanko, on behalf of herself and her children, Christine Sue Stanko, Micheal S. Stanko, and Cara M. Stanko,	*
	*
Appellants.	*

No. 89-1551

Concepcion Giove,	*
	*
Appellee,	*
	*
vs.	*
	*
Rudy Stanko,	*
	*
Appellant.	*

Appeals from the United States District Court for the District of Nebraska

Submitted: March 13, 1989
Filed: August 17, 1989

Before FAGG and BEAM, Circuit Judges, and DUMBAULD,* District Judge.

BEAM, Circuit Judge.

These cases were consolidated for purposes of appeal. Jean Stanko appeals the magistrate's[1] holding that three certificates of deposit held jointly by Rudy Stanko and each of his three children are the property of Rudy Stanko and consequently can be garnished by Rudy Stanko's creditors. Rudy Stanko appeals the district court's[2] determination that the magistrate had authority to enter judgement in this case without Rudy Stanko's consent. We affirm both the magistrate and the district court.

I. Background

Concepcion Giove obtained a default judgment against Rudy Stanko in the Untied States District Court for the District of Colorado. Giove then registered the judgment in the United States District Court for the

*The HONORABLE EDWARD DUMBAULD, Senior United States District Judge for the Western District of Pennsylvania, sitting by designation.

[1] The Honorable David L. Piester, United States Magistrate for the District of Nebraska.

[2] The Honorable Warren K. Urbom, United States District Judge for the District of Nebraska.

District of Nebraska and initiated the garnishment action which is the subject of this appeal. Jean Stanko, on behalf of herself and her three children, intervened in the garnishment proceeding claiming that the funds in the certificates of deposit belonged to Jean and Rudy Stanko's children and therefore were not available for garnishment by Giove. The case was submitted to the magistrate with the consent of Giove and Jean Stanko. The consent of Rudy Stanko was not obtained and he did not appear in the garnishment proceeding.

The magistrate held that the three certificates of deposit contained funds belonging to Rudy Stanko and ordered that Giove's judgment be enforced against the funds represented by the certificates. Rudy Stanko then filed a petition for reconsideration of the magistrate's judgment with the district court claiming that the magistrate did not have authority to render a decision in this case without Rudy Stanko's consent. The district court denied Stanko's petition for reconsideration and Stanko's subsequent request for a new trial.

II. Discussion

Because we must initially determine whether the magistrate had authority to enter judement in this case, we will first consider the merits of Rudy Stanko's appeal. "Upon the consent of the parties, a * * * magistrate * * * may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case." 28 U. S. C. § 636 (c)(1) (1982). Stanko argues that because his consent was not obtained, the magistrate had no authority to enter judgement in this case. The district court determined that Rudy Stanko "was not a party and is not a party to this garnishment proceeding, nor is he a necessary party." Giove vs. Cattle King, No. CV 86-L-582, slip op. at 2 (D. Neb. Jan. 5, 1989). Consequently, the court concluded that Stanko's consent was not required to vest the magistrate with the necessary authority. We agree.

At the time, Nebraska law did not require that the judgment debtor be a party to a garnishment proceeding seeking to obtain possession of the debtor's assets or even that the debtor be notified of such a garnishment action. (Neb. Rev. Stat. § 25-1011 (Cum. Supp. 1988) now requires the judgement creditor to send the judgement debtor a copy of the summons and order of garnishment, a notice to judgment debtor form and a request for hearing form.) Thus, we agree that Rudy Stanko was not a party to this action and, accordingly, agree that he consent was not necessary to give the magistrate jurisdiction.

Any person who claims an ownership interest in money or property sought to be garnished has the right to intervene in the garnishment action to assert the intervenor's rights, if any, in the property. Neb. Rev. Stat. § 25-1030.03 (Reissue 1985). Stanko could have become a party to this case, but only by intervening. The record indicates that he had the opportunity to intervene. Notice of the garnishment was mailed to Stanko's last known addresses, as were copies of the order granting Jean Stanko's motion to intervene and copies of the writs of garnishment.[3]

Having determine that all parties to this action consented, thereby giving the magistrate the authority to enter judgment, we now consider Jean Stanko's appeal of the merits of the magistrate's judgment. Jean Stanko claims that the magistrate erred in concluding that the funds in the certificates of deposit belonged to Rudy Stanko and were available for garnishment by Giove. The garnishment action involves three certificates of

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[3] Rudy Stanko contends that he did not receive the copies of these documents due to his movement within the prison system. However, this does not change our conclusion that Stanko was not a party to the garnishment and could have become a party only by intervening.

deposit which are titled as follows: "Cara M. Stanko, or Rudy G. Stanko or Jean Ann Stanko WROS," "Christine Sue Stanko or Rudy G. Stanko or Jean Ann Stanko WROS" and "Michael Scott Stanko or Rudy G. Stanko or Jean Ann Stanko WROS."

"A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums of deposit, unless there is clear and convincing evidence of a different intent." Neb. Rev. Stat. § 30.2703 (a) (Reissue 1985). A joint tenant's net contribution is "the sum of all deposits * * * made by or for him, less all withdrawals made by or for him which have not been paid to or applied to the use of any other party, plus a pro rata share of any interest or dividends market accounts. In addition, the magistrate concluded that the fact that the funds "passed through savings and checking accounts held nominally in (the children's) names does not, in and of itself demonstrate any 'contribution' on their part." Giove vs. Stanko, No. CV 86-L-582, slip op. at 14 (D. Neb. July 20, 1988).

The interpretation of state law by a trial court sitting in that forum is entitled to substantial deference. Benedictine Sisters vs. St. Paul Fire & Marine Ins. Co., 815 F. 2d 1209, 1211 (8th Cir. 1987) (citing Kifer vs. Liberty Mutual Ins. Co., 777 F. 2d 1325, 1330 (8th Cir. 1985)). We agree with the magistrate that the funds in the certificates of deposit belonged to Rudy Stanko. Although the funds at one time were held solely in the names of the children, it is clear that Rudy Stanko was the source of the funds and the person who was exercising exclusive control over the funds.

Jean Stanko alternatively argues that even assuming that Rudy Stanko did contribute the funds in the accounts, a gift was made of the funds to the children. It is presumed that no gift is intended when funds are deposited in a joint account and the intervenor has the burden of producing clear and convincing evidence that

the contributor intended the money deposited in the account to be a gift to the other joint tenants. Neb. Rev. Stat. § 30-2703 (a). The magistrate found that Jean Stanko did not meet this burden because she failed to show that Rudy Stanko, the contributor of the funds, intended the funds to be a gift to the three children. The magistrate stated that the evidence indicated that only Jean and Rudy Stanko had access to and control over the various accounts. In addition, the magistrate noted that there was no evidence which indicated that the children had any power to withdraw the money.

Our review of the evidence supports the magistrate's conclusion that there was insufficient evidence of a donative intent on the part of Rudy Stanko. Consequently, we affirm the magistrate's judgement.

III. Conclusion

For the foregoing reasons the decisions of the district court are affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CONCEPCION GIOVE,	)	CV86-L-582
	)	
Plaintiff,	)	
	)	MEMORANDUM AND
vs.	)	ORDER ON PETITION FOR
	)	RECONSIDERATION OF
CATTLE KING,	)	COURT'S ORDERS BY
RUDY STANKO, et	)	MAGISTRATE
	)	DAVID L. PIESTER
Defendants.	)	

A default judgement was entered against the defendants Rudy Stanko and Cattle King Packing Company in the United States District Court for the District of Colorado on July 8, 1986. The plaintiff then registered that judgement in the United States District Court for the District of Nebraska, pursuant to 28 U. S. C. § 1963. A writ of garnishment was then served upon the Scottsbluff National Bank & Trust Company, which responded that it held three certificates of deposit in which Rudy Stanko had an interest.

Jean A. Stanko, on behalf of herself and her children, moved on December 3, 1986, to intervene. Filing 9. That motion was granted on February 3, 1987. Filing 15. On June 30, 1987, pursuant to a "Consent to Proceed Before a United States Magistrate," signed by Jean A. Stanko, individually and as next friend of her children, and by Concepcion Giove, the case was referred to United States Magistrate David L. Piester for the conducting of all further proceedings and the entry of judgment in accordance with 28 U. S. C. § 636 (c). Filing 37. Since then, the matter has proceeded before Magistrate Piester

through discovery, pretrial conference, submission on the record and judgement for the plaintiff. That judgement has been appealed by the intervenor. Filing 89.

Before me now is a petition by Rudolph G. Stanko ("Rudy Stanko") for reconsideration of the orders of Magistrate Piester. The basic ground for the petition is that Rudy Stanko did not consent to proceed before the United States Magistrate and, therefore, the reference to the magistrate and the proceedings by the magistrate were a usurpation of Article III judicial authority. Filing 96. The intervenor, on behalf of herself and her children, confesses the request of Rudy Stanko. Filing 97. Rudy Stanko requests an injunction, a declaratory judgment, and a writ of mandamus to the United States Magistrate, whereby previous orders by the magistrate would be vacated and a writ of prohibition would be issued to restrain the magistrate.

The plaintiff has responded, arguing that because Rudy Stanko is not and was not a party to the garnishment action, his consent to proceed before a magistrate was unnecessary and that all person claiming an interest in the property at issue intervened and were represented.

It is Rule 69 of the Federal Rules of Civil Procedure that sets the direction of these proceedings. It provides that process to enforce a judgement for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution "shall be in accordance with the practice and procedure of the state in which the district courts is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable." Because this district court is held in Nebraska, it is the practice and procedure of Nebraska that applies.

Section 25-1056 of the Nebraska statutes makes provision for the judgement creditor to file an affidavit

that he or she has good reason to and does believe that a particular entity has property of and is indebted to the judgement debtor. After that, it says that the clerk shall issue summons and require the entity to answer written interrogatories to be furnished by the plaintiff and attached to the summons. The interrogatories then are to be answered by the entity, the garnishee. Thereafter, all further proceedings shall be in "all respects the same as is provided for in sections 25-1011 and 25-1026 to 25-1031.01 unless inconsistent with the provisions of this sections."

Section 25-1030.01 provides:

> "Upon filing an application for determination of liability of the garnishee, the plaintiff shall give the garnishee and the defendant in the original action notice of the filing thereof and of the time and place of trial thereon. The notice shall be given within such time and in such manner as the court shall direct."

Section 25-1030.02 provides that the trial of the determination of the liability of the garnishee "shall be conducted the same as in a civil action."

Section 25-1030.03 says:

> "Any person claiming ownership of any money or property sought to be reached in the possession or under the control of the garnishee as the property of the defendant in the original action may intervene in the garnishment proceedings by a suitable pleading and set up facts showing that the debt or the property with which it is sought to charge the garnishee is the property of such intervenor. The defendant in the original action may by a suitable pleading filed in the garnishment proceedings set up facts showing that the debt or the property with which it is sought to

charge the garnishee is (1) exempt for execution, or (2) for any other reasons is not liable for plaintiff's claim. If issue on such intervention or on such pleading by the defendant in the original action is joined by the plaintiff, it shall be tried with the issues as to the garnishee's liability. . . "

In the petition for reconsideration of court's orders by Magistrate David L. Piester, filing 96, Rudy Stanko says, "the defendant Rudy G. Stanko has not received various Court's orders signed by David L. Piester, documents filed by the Plaintiff's counsel and Intervenor's counsel, including the final order of disposition in this case. ..." That statement is not evidence. See Rule 43 of the Federal Rules of Civil Procedure. The statement, however, does raise the issue of whether there has been compliance with § 25-1030.01. I find nothing in the file or Stanko's petition for reconsideration of court's orders that suggests that the plaintiff gave Rudy Stanko, who was a defendant in the orginal action, notice of the filing of whatever pleading may constitute an application for determination of liability of the garnishee and notice of the place of trial. It appears to me that until that factual issue is resolved and the significance of the resolution is determined, I am not in a position to decide whether the petition for reconsideration should or should not be granted.

IT THEREFORE IS ORDERED that the parties shall have until November 9, 1988, in which to submit (a) affidavits or affirmation on the factual issue of whether § 25-1030.01 Neb. R. R. S. (1943) (Reissue of 1985) was complied with respecting notice and (b) additional briefs on the issue of the effect of the giving or failing to give such notice, as that effect bears on the petition for reconsideration of court's orders by Magistrate David L. Piester.

Dated October 14, 1988.

BY THE COURT

Warren K. Urbom
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CONCEPCION GIOVE,	)	CV86-L-582
	)	
Plaintiff,	)	
	)	
vs.	)	MEMORANDUM AND ORDER OF
	)	PETITION FOR
CATTLE KING,	)	RECONSIDERATION OF COURT'S
RUDY STANKO,	)	ORDERS BY MAGISTRATE
et al.,	)	DAVID L. PIESTER
	)	
Defendants.	)	

The memorandum and order of the October 19, 1988, left unresolved the issue of whether the petition for reconsideration should be granted until the parties had an opportunity to respond to the court's inquiry regarding the applicability of and compliance with §§ 25-1030.01, 25-1030.02 and 25-1030.03. The plaintiff's supplemental brief is persuasive in arguing that §25-1030.03 applies and that the others do not. The garnishee admitted liability and there was therefore no need for a determination by the court of the liability. Thereafter the original defendant, Rudy Stanko, had ample opportunity under § 25-1030.093 to intervene if he wished to claim ownership of any money or property sought to be reached by the garnishment.

Nebraska's statute authorizing intervention by an person claiming an ownership interest does not require notice to the judgement debtor. It does authorize the defendant in the original action to file a petition in intervention. The court records--the civil docket sheet--in this case shows the sending of notice as follows:

"Pl's praecipe for issuance of Writ of Garnishment Issued Writ of Garnishment-Orig. & 2 -to pl's counsel-copy mailed to Judgment-Debtor Rudy G. "Butch" Stanko, #18259013, P. O. Box 1000-LVC, Leavenworth, KS 66048 and 2101 W. 20th, Scottsbluff, NE 69361,"

mailed November 18, 1986.

"Order (WKU) granting motion to intervene by Jean A. Stanko (#9); funds represented by certificates of deposit shall be paid by garnishee, Scottsbluff Nat'l Bank, into registry of this court; and giving party, including intervenor, until 2-18-87 to make further showing re motion to distribute funds to pl Copy mailed to counsel, garnishee and Rudy G. "Butch" Stanko,"

mailed February 3, 1987.

"Issued Writs of garnishment - Orig & 2 - to pl's counsel-copy mailed to judgment-debtor Rudy G. "Butch" Stanko, #18259013, P. O. Box 1000-LVC, Leavenworth, KS 66048 and 2101 W. 20th, Scottsbluff, NE 69361,"

mailed April 9, 1987.

"Writ of garnishment issued - orig & 2 - to pl's attorney; copy mailed to judgment-debtor Rudy G. "Butch" Stanko, #18259013, P. O. Box 1000-LVC, Leavenworth, KS 66048 and 2101 West 20th, Scottsbluff, NE 69361,"

mailed May 6, 1987.

> "Writs of garnishment issued - Orig & 2 - to pl's attorney' copy mailed to judgement-debtor Rudy G. "Butch" Stanko, #18259013, P. O. Box 1000 - LVC Leavenworth, KS 66048 and 2101 W. 20th, Scottsbluff, NE 69361."

mailed July 8, 1987. No objections were made by Rudy G. Stanko, no intervention was attempted, no contact with the court was made.

Rudy G. Stanko was not a party and is not a party to this garnishment proceedings, nor is he a necessary party.

There are attached to the defendant's brief in response to court's order of October 19, 1988, a declaration of Rudy Stanko dated October 24, 1988, and a declaration of Cynthia Casselman dated November 7, 1988. While they are aimed, evidently, at establishing that the items listed above as having been mailed to Rudy G. "Butch" Stanko were not received by him, they failed to establish that. The declaration of Rudy Stanko, refers to "the orginal action notice of this filing," "the time and place of trial," "various Court Orders signed by David L. Piester," "documents filed by the Plaintiff's Counsel and Intervenor's Counsel," or "the final order of disposition in this case." The documents that were mailed by the clerk of this court were, I find, received by Rudy G. Stanko and they gave him adequate notice of the proceedings to enable him to intervene, if he so chose, in accordance with § 25-1030.03 of the Nebraska Revised Statutes.

Stanko argues that the United States Magistrate had no authority to enter orders, because he endeavored to exercise Article III authority. I am not persuaded. The proceedings before the magistrate were with the consent of the parties to the action, and § 636 (c) of the Magistrates Act authorizing the magistrate's actions is

constitutional. Lehman Brothers Kuhn Loeb Incorporated v. Clark Oil & Refining Corporation 739 F. 2d. 1313 (8th Cir. 1984).

Date January 5, 1989.

BY THE COURT

Warren K. Urbom
United States District Judge